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In the
Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 83

GARRETT H. BYRNE, as he is the duly elected District Attorney for Suffolk County, City of Boston, Commonwealth of Massachusetts, and ROBERT H. QUINN, Attorney General of the Commonwealth of Massachusetts,

APPELLANTS,

v.

SERAFIM KARALEXIS, JAMES VLAMOS, SYMPHONY CINEMA II, INC., and FILM DISTRIBUTORS, INC., all of 252 Huntington Avenue, Boston, Massachusetts,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

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Blanchard Press, Inc., Boston, Mass. — Law Printers



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APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Jurisdictional Statement

Appellants appeal from the order of the United States District Court for the District of Massachusetts, entered on December 6, 1969, enjoining relevant state law enforcement officers from prosecuting the public showing of the

film, "I Am Curious (Yellow)", and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

Opinion Below

The opinion of the United States District Court for the District of Massachusetts is not yet reported and is included herein as Appendix A.

Jurisdiction

The judgment of the United States District Court for the District of Massachusetts authorizing the issuance of a preliminary injunction was entered on November 28, 1969. The preliminary injunction was issued on December 6, 1969 (App. B). On December 15, 1969, this Court stayed the order of the United States District Court for the District of Massachusetts pending the filing of a Jurisdictional Statement, *Byrne* v. *Karalexis, et al.* (38 U.S.L.W. 3221). A timely Supplemental Notice of Appeal was filed on December 24, 1969. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1253.

Question Presented

Whether the district court erred in enjoining relevant state law enforcement officers from prosecuting the public showing of the film, "I Am Curious (Yellow)"—a film which the Massachusetts Superior Court found, and the district court assumed, to be obscene under the applicable constitutional tests set forth by this Court.

Statute Involved

Mass. Gen. Laws, ch. 272, §28A, provides:

> "Whoever imports, prints, publishes, sells or distributes a pamphlet, ballad, printed paper, phono-

graphic record, or other things which is obscene, indecent or impure, or an obscene indecent or impure print, picture, figure, image or description, or buys, procures, receives or has in his possession any such pamphlet, ballad, printed paper, phonographic record, obscene, indecent or impure print, picture, figure, image or other thing, for the purpose of sale, exhibition, loan or circulation, shall be punished by imprisonment in the state prison for not more than five years or in a jail or house or correction for not more than two and one half years, or by a fine of not less than one hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment in jail or the house of correction."

Statement

On June 3, 1969, the appellees were indicted by the Suffolk County Grand Jury of possessing with intent to exhibit, and exhibiting, an obscene film—"I Am Curious (Yellow)"—in violation of Mass. Gen. Laws, Ch. 272, §§28A and 32, respectively. On or about June 17, 1969, appellees filed an Amended Complaint[1] in the United States District Court for the District of Massachusetts seeking, *inter alia*, to enjoin future prosecutions of the film, and to declare the prosecution of that film and the statutes (Mass. Gen. Laws, Ch. 272, §§28A, 32) unconstitutional on their face (R. 2).[2] On June 24, 1969, a three-judge district court temporarily enjoined the prosecution on the ground that the indictments

[1] The original complaint was withdrawn by the respondents prior to the filing of a response by the appellant, Garrett H. Byrne.

[2] Prior to preparation of this Jurisdictional Statement, the record was transmitted to the Clerk of this Court. References ("R") are therefore to the Index Number assigned to the particular document.

did not allege *scienter* (R. 3). On June 25, 1969, the Suffolk County Superior Court, with the assent of the district attorney, dismissed the indictments. On or about June 30, 1969, appellees filed an amendment to their Amended Complaint in which they alleged that they had sufficient cause to believe that new indictments would be returned, and renewed their request that the appellant Garrett H. Byrne be enjoined from prosecuting the film (R. 6). Thereafter, the Suffolk County Grand Jury returned new indictments charging all appellees with possessing, with intent to exhibit, obscene matters—the film, "I Am Curious (Yellow)"—in violation of Mass. Gen. Laws, Ch. 272, §28. On July 15, 1969, the district court, after a hearing, denied the motion for a temporary injunction, stating (R. 11, p. 2):

> "The motion for a temporary injunction is denied at this time, subject to renewal if and when petitioner is convicted in the Suprerior Court. If petitioner is convicted and the prosecution offers to renew the present stipulation, that no seizure of film or interruption with the showing will be made, the motion for injunction shall not be renewed until a motion for judgment n.o.v. shall be heard and determined against the petitioner, or for 30 days after verdict, whichever shall first occur."

On November 12, 1969, the appellees were convicted in the Suffolk County Superior Court. At the present time, exhibition of the film has been discontinued, and the appellants have not agreed that appellees may exhibit the film pending pursuit of appropriate state appellate remedies.

On or about November 19, 1969, appellant Garrett H. Byrne moved the district court to abstain from granting the relief sought in the Complaint pending resolution of the issues raised therein by the Massachusetts Supreme Ju-

dicial Court (R. 13). On November 28, 1969, after further argument, the district court, one judge dissenting, denied the motion for abstention, and ordered the issuance of a preliminary injunction enjoining future prosecutions of the film, "I Am Curious (Yellow)" (App. A). On December 6, 1969, the district court issued the preliminary injunction (App. B), but stayed its effect pending the disposition of an application for a stay by this Court pursuant to the provisions of Rules 18, 50, and 51, of the Rules of this Court. (R. 22, 23). On the same date, Robert H. Quinn, Attorney General of the Commonwealth of Massachusetts, was ordered added as a party defendant without objection (R. 21). On December 15, 1969, this Court stayed the effect of the preliminary injunction issued by the district court pending the filing and disposition of a Jurisdictional Statement (App. C). A timely notice of appeal was filed on December 24, 1969 (R. 27).

The Questions are Substantial

In support of the motion for abstention, the appellant argued below: (1) that this Court's decision in *Stanley* v. *Georgia*, 394 U.S. 557, 37 U.S.L.W. 4315, does not indicate a departure from the established rule, *Roth* v. *United States*, 345 U.S. 476, and *Memoirs* v. *Massachusetts*, 383 U.S. 413, that a state may constitutionally proscribe the commercial distribution and dissemination of obscene material; and (2) even if *Stanley* does indicate such a departure, final determination of that issue should be left to the Supreme Judicial Court of Massachusetts, which has the power to construe, in appropriate circumstances, state statutes presenting possible constitutional conflict. A majority of the district court—extending *Stanley* further than any other court to date—found "* * * it probable that *Roth* remains intact only with respect to public dis-

tribution in the full sense, and that restricted distribution, adequately controlled, is no longer to be condemned." (App. A. ——). It accordingly found it probable that the statute (Mass. Gen. Laws, Ch. 272, §28A) is overbroad, and thus, unconstitutional on its face. A majority of the district court further held that, in the circumstances of this case, abstention would be improper (App. A. 19).

1. In our view, the district court abused its discretion in granting the preliminary injunction in the circumstances of this case. See *United States* v. *Corrick*, 298 U.S. 435; *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U.S. 310. Although the *apparent* effect of the preliminary injunction goes no further than allowing the appellees to show the film, "I Am Curious (Yellow)", under certain limited conditions—*i.e.*, the "injunction shall not apply if the said picture is advertised in a manner pandering to a prurient interest in sex, or is shown to an audience not warned of its possibly offensive character, or is shown to children under the age of 18 years" (App. B)—the *true* and *practical* effect runs much deeper. The district court did not purport to rule that the statute (Mass. Gen. Laws, Ch. 272, §28A) was unconstitutionally applied to the appellees in the circumstances of this case; it went further and, for all practical purposes, held that the statute itself was unconstitutional on its face because of its alleged overbreadth. In this posture, the Commonwealth of Massachusetts is, for all intents and purposes, presently without a statute to prosecute even that type of distribution of obscene material which this Court has indicated a state may properly proscribe. See *Redrup* v. *New York*, 386 U.S. 767.[3]

[3] Our concern here is not hypothetical. Already two persons previously convicted of selling obscene magazines in violation of Mass. Gen. Laws, ch. 272, §28A (see *Commonwealth* v. *Johnson*, 1969 Mass. Adv. Sh. 824, certiorari denied *sub nom. Johnson*

As we read the applicable decisions of this Court, a federal district court, in determining whether or not to grant injunctive relief similar to that granted here, must independently assess two separate and distinct factors: First, whether a cause of action in equity is stated which would warrant the granting of injunctive relief, *Douglas* v. *City of Jeanette*, 319 U.S. 157; *Zwickler* v. *Koota*, 389 U.S. 241; and secondly, assuming that injunctive relief is otherwise warranted, whether it would be appropriate to abstain pending further proceedings in the state courts. *Dombrowski* v. *Pfister*, 380 U.S. 479; *Zwickler, supra; Cameron* v. *Johnson*, 390 U.S. 611.

A. In assessing the first condition—*i.e.*, the requisites for injunctive relief—this Court has pointed to traditional equitable considerations governing the granting *vel non* of injunctive relief. This approach essentially amounts to a balancing of various interests including, but not limited to, the possibility of irreparable injury which would be suffered by the petitioning party absent the grant of injunctive relief, *Dombrowski, supra*, at 485-489; and the impact of injunctive relief upon the proper administration of law enforcement by state law enforcement officers. *Douglas, supra.*

In our view, the district court erred in finding an irreparable injury which, on balance with other countervailing considerations, warranted immediate injunctive relief.

In finding irreparable injury, a majority of the district court pointed to a supposed monetary loss of box office

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v. *Massachusetts*, No. 458, O.T. 1969 [38 U.S.L.W. 3223]), and whose convictons — in our view — are sustainable under any interpretation of this Court's decision in *Stanley* v. *Georgia*, 394 U.S. 557, have filed petitions for a writ of habeas corpus on the ground, *inter alia*, that the statute is unconstitutional on its face under the holding of the district court in the present case. See *Joseph M. Palladino, Sr.* v. *Joseph V. McBrine*, Misc. Civil No. 70-7-J (D. Mass.); *John L. Hynt* v. *Howard W. Fitzpatrick*, Misc. Civil No. 70-8-G (D. Mass).

receipts which would be caused by a delay in showing the film (App. A. 20). As properly pointed out in the dissenting opinion (App. A. 26-27), however, the appellees never alleged—much less showed—any facts indicating the extent of a monetary loss, if any, which would be caused by delay. A majority of the district court simply assumed —without any showing or substantiation whatsoever—that a delay in exhibition would cause a proportionate loss in box office receipts. This finding simply was not warranted by the record before the district court.[4]

A majority of the district court also indicated "* * * that in assessing injury the chilling effect upon the freedom of expression of others is to be considered." (App. A. 20). Without challenging the correctness of that approach, it is nevertheless clear that—in the circumstances of this case—no irreparable injury can be shown. In the present case, the district court assumed the film to be obscene in the constitutional sense (App. A. 17). It thus assumed, *inter alia*, that the film was utterly without redeeming social value. *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418. In these circumstances, it can hardly be argued that depriving "others" of a chance to see a film which is utterly without redeeming social value amounts to a showing of irreparable injury.

Moreover, even assuming that there was a valid allegation and showing of irreparable monetary loss, that showing, on balance, does not warrant the relief granted by the district court. As pointed out above, the effect of granting injunctive relief in the circumstances of this case runs deeper than merely allowing the film to be exhibited during appellees' pursuit of appropriate state appellate reme-

[4] If past experience serves as a relevant guide, it seems to us that box office activity is heightened, not diminished, by the publicity engendered by legal proceedings such as the present proceeding.

dies. In granting injunctive relief ancillary to the complaint, the district court has, for all practical purposes, decided a fundamental question of law—*i.e.*, that the Massachusetts obscenity statute (Mass. Gen. Laws, ch. 272, §28A) is unconstitutional on its face. It thus—for all practical purposes—has left the Commonwealth of Massachusetts without a statute to prosecute those kinds of obscenity violations which otherwise could be properly prosecuted by the state. See *Redrup* v. *New York*, 386 U.S. 767. In these circumstances, there was no showing in the district court of facts which, on balance, would warrant a departure from the established rule that a federal court should not interfere, by way of injunctive relief, with the good faith administration of criminal laws by state enforcement officials.[5] *Douglas* v. *City of Jeanette*, *supra*.

B. Even if the appellees properly alleged a cause of action in equity warranting immediate injunctive relief, the district court erred in not abstaining in the circumstances of this case. This Court has repeatedly indicated that abstention is appropriate where litigation in the state court would avoid an unnecessary decision by the federal court of a serious constitutional question, or where it would present the constitutional issue to the federal court in a completely different posture. *Harrison* v. *NAACP*, 360 U.S. 167; *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185, 188-189; *Zwickler* v. *Koota*, 389 U.S. 241, 255-256 (concurring opinion of Mr. Justice Harlan).[6] In

[5] In this particular, the present case is clearly distinguishable from *Dombrowski* v. *Pfister*, 380 U.S. 479. In that case, there was a showing that prosecutions were threatened in bad faith, with no hope of ultimate success at trial, and simply for the ulterior purpose of discouraging the plaintiffs from exercising protected First Amendment activities. In the present case, there was no allegation — much less any showing — of bad faith on the part of the prosecutor.

[6] As noted by this Court (*Zwickler*, at 249, n. 11), abstention is also appropriate in diversity cases where adjudication of a con-

the present case, the appellees posed a frontal challenge to the constitutionality of the statute (Mass. Gen. Laws, ch. 272, §28A) on its face. They essentially alleged and argued that a logical extension of this Court's holding in *Stanley* v. *Georgia*, 394 U.S. 557, constitutionally precludes a state from proscribing an adequately controlled public exhibition[7] of an obscene film; that the Massachusetts statute, on its face, proscribed such conduct; and thus, that the statute was impermissibly overbroad and unconstitutional on its face. The appellants argued against an extension of *Stanley* to the bench mark suggested by appellees. The appellants further argued that, since the action was framed within the context of a challenge to the constitutionality of the statute on its face, the court should abstain pending further proceedings—and possible construction—in the state courts. The district court denied the motion for abstention.

In our view, the district court erred and abused its discretion in not abstaining pending further proceedings in the state court. In the context in which the action was framed, the district court was asked to pass on the constitutionality of the statute as written, without benefit of state construction. Thus, even though that statute is obviously constitutional on its face to the extent that it proscribes commercial distribution in a manner offensive to an unwilling audience, the district court could not judicially carve and construe that statute so as to separate the good from the bad. If left to the Massachusetts Supreme Judicial Court, however, that court could—if it found that Stanley precludes prosecution for the adequately

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stitutional issue is in part dependent upon construction of local law; and in cases involving possible disruption of complex state administrative processes.

[7] *I.e.*, exhibition in a manner which would preclude the admission of minors, preclude pandering, and which would warn prospective patrons of the possible offensiveness of the film.

controlled public exhibition of obscene films—construe the statute accordingly, reverse the convictions, and still leave the Commonwealth free to prosecute other obscenity violations which are left unaffected by *Stanley*. That court has not, in the past, shown its reluctance to construe the statute here in question in order to meet constitutional mandate. Thus, following this Court's decision in *Smith* v. *California*, 361 U.S. 147, the Massachusetts Supreme Judicial Court construed the present statute so as to avoid future constitutional conflict. See *Demetropolis* v. *Commonwealth*, 342 U.S. 658. We have no hesitancy in stating here that—given the task—the Supreme Judicial Court will again review the constitutionality of that statute in light of emerging constitutional doctrine, and construe the statute accordingly.[8] In these circumstances, the district court erred in not abstaining pending further appellate proceedings in the state courts.

2. As noted above, the fountainhead of the district court's action below was that court's conclusion that under *Stanley v. Georgia*, 394 U.S. 557, a state cannot constitutionally prohibit the "adequately controlled" public exhibition of obscene films. In our view, the decision of

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[8] During oral argument on the motion for abstention, Chief Judge Aldrich suggested that further construction would be unreasonable to assume — especially in view of the fact that the legislature obviously could not have anticipated the *Stanley* decision (November 21, 1969 Hearing Tr. 16). Other opinions of the Massachusetts Supreme Judicial Court strongly suggest, however, that that court will strive to narrowly construe a statute to save its constitutionality in the face of emerging constitutional doctrine even if that construction involves the application of considerations not available to the legislature when originally passed. Thus, in *Alegata* v. *Commonwealth*, 353 Mass. 287, 302-304, a challenge was made to the constitutionality of the "disorderly conduct" statute (Mass. Gen. Laws, ch. 272, §53). The court narrowly construed the statute and gave it the same meaning as given to it by Section 250.2 of the Model Penal Code (Proposed Official Draft), even though that definition obviously was not available to the legislature when the statute was originally enacted in 1943.

the district court—which goes further than any other decision to date—raises a substantial question which necessitates final resolution by this Court.

In *Roth* v. *United States*, 354 U.S. 476, a majority of this Court unequivocally held that obscenity[9] is not protected by the First Amendment to the United States Constitution. We are aware of no decision by this Court—prior to *Stanley*—which even intimates a departure from that holding. Indeed, less than four years ago, a majority of this Court reaffirmed the principle that commercial distribution of obscene material is not protected by the First Amendment. *Ginsberg* v. *United States*, 383 U.S. 463; *Memoirs* v. *Massachusetts*, 383 U.S. 413.

In our view, *Stanley* does not indicate the demise of *Roth* and its progeny. In that case, the Georgia statute under challenge (Ga. Code Ann. §26-6301 [Supp. 1968]) proscribed, *inter alia*, private possession of material known to be obscene. This Court, in part pointing to complementary roles between the First and Fourth Amendments, reversed the conviction based upon that statute, holding that a State cannot constitutionally punish a person for private possession of obscene material within the privacy of his home. Nothing in that decision, however, detracts from the continued vitality of *Roth*. Indeed, this Court went to great lengths to narrow the import of its holding, stating:

> *Roth* and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with obscenity. * * *

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[9] A plurality of this Court has held that material may properly be adjudged as obscene if it is "* * * established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418.

Roth and the cases following it discerned such an "important interest" in the regulation of *commercial distribution* of obscene material. (37 U.S.L.W. at 4317) (Emphasis added).

> We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime [footnote omitted]. *Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home.

In view of this limiting language, it is our view that the *Stanley* decision is applicable only where the Fourth Amendment considerations present in that case are also present. Lacking such Fourth Amendment considerations —as would be the case where public distribution is involved—the First Amendment protection does not attach, and prosecution is therefore proper.[10]

Moreover, even if we are wrong in our assumption that the First Amendment does not provide a haven for those who commercially distribute obscene material, nevertheless, the issue is significant enough to warrant final clarification and resolution by this Court. It is no secret that the issue of obscenity *vis a vis* the law is one which divides not only the judiciary, but the nation as well. In order to cope with this mounting problem, the Commonwealth of Massachusetts, as well as other jurisdictions,[11] has estab-

[10] The notion that the First and Fourth Amendments, under a given set of circumstances, complement each other, is not a new one, but has been expressed by individual Justices of this Court. See *Lopez* v. *United States*, 373 U.S. 427, 469-470 (dissenting opinion of Mr. Justice Brennan, with whom Mr. Justice Douglas and Mr. Justice Goldberg joined).

[11] See *e.g.*, Public Law 90-100, 83 Stat. 253 (1967).

lished commissions and other legislative advisory groups in order to indicate the direction in which further legislative action should be taken, if any. At the present time, such activity has been slowed to a standstill, since the permissible area in which legislation may be directed is far from clear as a result of the *Stanley* decision. In these circumstances, only this Court can fully and finally measure and delineate the impact of the *Stanley* decision on the administration of law enforcement by the several states.[12]

Conclusion

For the reasons stated above, it is respectfully submitted that the questions presented on appeal are substantial and that they are of public importance. It is therefore respectfully submitted that this Court should note probable jurisdiction, and set the matter for argument.

Respectfully submitted,

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[12] This Court has noted probable jurisdiction in *Batchelor* v. *Stein*, No. 565, O.T. 1969 (38 U.S.L.W. 3205). Although one of the questions presented in that case is similar to that presented herein, disposition of that case would not necessarily control the disposition here. In that case, it appears that the appellee was threatened with prosecution under a statute which, *inter alia*, prohibited private possession of obscene material. The statute here in question (Mass. Gen. Laws, ch. 272, §28A) does not reach private possession, and the Court in the *Batchelor* case may not reach the issues presented herein. Moreover, the statute involved in the *Batchelor* case defines obscenity according to a *local* standard, not a *national* standard as indicated by this Court in *Jacobellis* v. *Ohio*, 378, U.S. 185, 193-195. Thus, *Batchelor* would not be dispositive of the questions presented here.

EXHIBIT A

UNITED STATES DISTRICT COURT
for the
DISTRICT OF MASSACHUSETTS

Civil Action
No. 69-665-J

SERAFIM KARALEXIS ET AL.,
PLAINTIFFS,
v.
GARRET H. BYRNE, as he is the duly elected District Attorney for Suffolk County, City of Boston, Commonwealth of Massachusetts
DEFENDANT.

Before ALDRICH, *Circuit Judge*,
JULIAN and PETTINE, *District Judges*.

OPINION

November 22, 1969

ALDRICH, *Circuit Judge*. This is a three-judge district court action in which a frontal attack is made upon a state obscenity statute, based upon the Court's recent decision in *Stanley* v. *Georgia*, 1969, 394 U.S. 557. In that case the Court reversed a state conviction for possession of a concededly obscene moving picture film, found in the home of the defendant. We are asked to rule that this decision extends to a case where the possessors permitted a number of consenting adults or, more exactly, paying adult members of the public, to view their possibly obscene picture in a moving picture house.

Briefly, the facts are these. Plaintiffs Karalexis et al. are the owners and operators of a moving picture threatre which has been engaged in showing a film, owned and

leased by Grove Press, Inc.,[1] entitled "I Am Curious (Yellow)." The named defendant is the county district attorney who has charged plaintiffs with violation of Mass. G.L. c. 272 § 28A[2] as a result of their exhibiting the film, but notice has been given, 28 U.S.C. § 2284, and an assistant attorney general has conducted the defense throughout. Plaintiffs seek a declaration that the statute is unconstitutional and an injunction against prosecution thereunder. Because of the fact that the original indictments were defective, the proceedings sought to be enjoined postdate the assumption of jurisdiction by this court, and no question arises under 28 U.S.C. § 2283, the anti-injunction, or what is sometimes called the comity, statute.

Defendant's broad motion to dismiss tests the substance of plaintiffs' case. Our present question, however, is only whether we shall issue a temporary injunction pending final disposition, there being possible reasons to withhold the making of a final decision, which we have not yet fully explored. Alternatively, there is the question whether we should abstain altogether, without granting temporary relief. With respect to the first question the issues, of course, are whether there is a probability that plaintiffs will ultimately prevail, *Automatic Radio Mfg. Co.* v. *Ford Motor Co.*, 1 Cir., 1968, 390 F.2d 113, *cert. denied* 391 U.S. 914, and the adequacy of the remedy at law.

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[1] Grove Press, Inc.'s motion to intervene was originally denied, counsel being permitted, instead, to appear as an amicus. In view of this opinion, Grove Press may be allowed to renew its motion at an early date.

[2] "§ 28A. Importing, printing, distributing or possessing obscene things.

Whoever imports, prints, publishes, sells or distributes a pamphlet, ballad, printed paper, phonographic record, or other thing which is obscene, indecent or impure, or an obscene, indecent or impure print, picture, figure, image or description, or buys, procures, receives or has in his possession any such pamphlet, ballad, printed paper, phonographic record, obscene, indecent or impure print, picture, figure, image or other thing, for the purpose of sale, exhibition, loan or circulation, shall be punished . . . ."

The following facts appear by stipulation of counsel or otherwise. Plaintiffs have sufficiently indicated to the viewing public the possible offensiveness of the film, so that no patron will be taken unawares and his sensibilities offended. On the other hand, the film is not advertised in any pandering manner within the stricture of *Ginsburg* v. *United States*, 1966, 383 U.S. 463. Finally, it is conceded that the threatre is policed, so that no minors are permitted to enter.

For purposes of this case we assume that the film is obscene by standards currently applied by the Massachusetts courts.[3] In this connection we note that the Superior Court of Massachusetts, in the recent case of *Commonwealth* v. *Karalexis*, has found that "the dominant theme of the film ... is its appeal to prurient interest in sex .... [The film] is patently offensive to the average person and an affront to community standards ... [It] is utterly without redeeming social value." Except insofar as it found statements in the opinion favorable to its conclusions in other respects, the Superior Court disposed of *Stanley* v. *Georgia* by stating it to be "irrelevant."

In *Stanley* Mr. Justice Marshall wrote the opinion of the Court in which four others joined. Mr. Justice Black concurred in the result because, in his mind, no case-by-case reasoning is needed in the area of obscenity; all is permissible.[4] The remaining three justices concurred on

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[3] Another court, viewing this same film, has differed. *United States* v. *"I Am Curious (Yellow),"* 2 Cir., 1968, 404 F.2d 196.

[4] The Superior Court's extensive analysis in *Karalexis* of a decade of the Supreme Court's views, reaching the conclusion that there is no majority agreement on any one approach to obscenity apart from the fact that it disregards such an agreement in *Stanley*, overlooks the fact that if only four or even three, justices agree on one method by which immunity is reached, this agreement is as significant as if five joined, so long as there are enough other justices who can be counted on to concur in the result. If we may be pardoned the analogy, if deuces are wild, an inside straight flush and a deuce takes the pot.

Fourth Amendment grounds,[5] stating that the obscenity question should not have been reached. The Court held that in certain circumstances possession of a moving picture film is constitutionally protected even though by contemporary standards the film is obscene. We do not consider this irrelevant.

The question is, how far does *Stanley* go. Is the decision to be limited to the precise problem of "mere private possession of obscene material," 394 U.S. at 561; is it the high water mark of a past flood, or is it the precursor of a new one? Defendant points to the fact that the Court in *Stanley* stated that *Roth* v. *United States*, 1957, 354 U.S. 476, was "not impaired by today's holding," and in the course of its opinion recognized the state's interest there upheld in prohibiting public distribution of obscenity. Yet, with due respect, *Roth* cannot remain intact, for the Court there had announced that "obscenity is not within the area of constitutionally protected speech or press," 354 U.S. at 485,[6] whereas it held that Stanley's interest was protected by the First Amendment, and that the fact that the film was "devoid of any ideological content" was irrelevant. 394 U.S. at 566.

Of greater importance, a need for affirmative proof that obscenity raises a "clear and present danger of antisocial conduct or will probably induce its recipients to

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[5] Not the Fourth Amendment grounds on which the defendants assert the majority opinion rests. The three concurring justices regarded the warrant under which Stanley's home had been searched insufficient to justify the seizure of the film. The opinion of the Court, pointedly, it may be thought, ignored that issue. The present defendant's claim that, nevertheless; the Court looked to a Fourth Amendment general protection of privacy, is made in the face of the fact that the Court spoke constantly in terms of the First and Fourteenth Amendments and did not mention the Fourth.

[6] "[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." 354 U.S. at 494.

such conduct," rejected in *Roth*, was stated in *Stanley* to have been rejected in the area of "public distribution." The obverse is apparent. Of necessity the *Stanley* court held that obscenity presented no clear and present danger to the adult viewer, or to the public as a result of his exposure. Obscenity may be offensive; it is not per se harmful.[7] 394 U.S. at 567. Had the Court considered obscenity harmful as such, the fact that the defendant possessed it privately in his home would have been of no consequence.

In recognizing that public distribution differed from private consumption, the Court in *Stanley* gave two examples. In the case of public distribution, "obscene material might fall into the hands of children ... or ... it might intrude upon the sensibilities or privacy of the general public." 394 U.S. at 567. To these examples, which were the extent of the Court's discussion, it can be said, equally with *Stanley*, "No such dangers are present in this case."

We confess that no oracle speaks to Karalexis unambiguously. Nonetheless, we think it probable that *Roth* remains intact only with respect to public distribution in the full sense, and that restricted distribution, adequately controlled, is no longer to be condemned. It is difficult to think that if Stanley has a constitutional right to view obscene films, the Court would intend its exercise to be only at the expense of a criminal act on behalf of the only logical source, the professional supplier.[8] A constitutional right to receive a communication would seem meaningless if there were no coextensive right to make it. *Cf. Griswold* v. *Connecticut*, 1965, 381 U.S. 479. If a rich Stanley can

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[7] Non constat that a film which went beyond ordinary obsenity by exhorting sexual misconduct might be prohibited. Exhortation is not suggested in the case at bar.

[8] It may be suggested that the supplier would run a particular risk, since the apprehended possessor of the film would, under *Stanley*, have no Fifth Amendment privilege to resist inquiry.

view a film, or read a book, in his home, a poorer Stanley should be free to visit a protected theatre or library. We see no reason for saying he must go alone.[9]

So much for the probability of success. We do not agree with defendant's contention that there is no indication of irreparable injury. Even if money damages could be thought in some cases adequate compensation for delay, this defendant will presumably be immune. We agree with plaintiffs that the box office receipts, if there is a substantial delay, can be expected to be smaller. A moving picture may well be a diminishing asset.[10] It has been said, also, that in assessing injury the chilling effect upon the freedom of expression of others is to be considered. *See Dombrowski* v. *Pfister*, 1965, 380 U.S. 479, 486-89.

This leads us to defendant's contention that we should, nevertheless, abstain until the Massachusetts Supreme Judicial Court has considered this question, since plaintiffs can raise it in their appeal from their Superior Court convictions. However, if our interpretation of *Stanley* is correct, we find it difficult to think the Massachusetts statute susceptible to a construction which would save it from overbroadness. Hence we must regard abstention as improper. *Zwickler* v. *Koota*, 1967, 389 U.S. 241. In the field where Congress has established a three-judge district court, abstention may still be warranted if there is a reasonable likelihood that the state court may construe its statute so as to avoid constitutional issues, but abstention is not appropriate simply to allow the state court

[9] For a further discussion of *Stanley* v. *Georgia*, *see* The Supreme Court, 1968 Term, 83 Harv. L. Rev. 7, 147-154 (1969).

[10] The fact that plaintiffs are economically motivated is of no significance. *New York Times* v. *Sullivan*, 1964, 376 U.S. 254. In *Interstate Circuit, Inc.* v. *Dallas*, 1968, 390 U.S. 676 at 684, the Court spoke disapprovingly of the effect of the Dallas ordinance upon "one who wishes to convey his ideas through that medium [films], which of course includes one who is interested not so much in expression as in making money. . . ."

to be the one to decide the statute's basic conflict with the federal constitution.[11]

We do not understand, however, certain apprehensions voiced by the defendant. We note, accordingly, that this is a decision of probability, not a final holding that the Massachusetts statute is unconstitutional. Much less is it a decision that one who distributes to children, or who creates a clear public nuisance, has standing to raise the contention that the statute is overbroad.[12] The preliminary injunction presently to issue will be restricted to, and conditioned upon, plaintiffs' adherence to the restrictions described earlier in this opinion. Nor do we consider the difference between the right to regulate conduct as distinguished from expression. *Cf. Derrington* v. *City of Portland, Or.*, 2/26/69, *cert. denied* 38 L.W. 3170. Finally, we voice no opinion as to the legal consequences if plaintiffs exhibit that under the protection of our injunction, and it is ultimately determined that our view was mistaken and that such exhibition was properly considered illicit.

Because of the importance of the matter, the injunction will not issue for one week, to permit plaintiffs to add other parties, if so advised, and to give the defendant

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[11] There is an alternative possibility, that the Supreme Judicial Court would find the film not obscene. The Superior Court, in an elaborate opinion, has found otherwise. We are not moved by the thought that we should postpone permitting plaintiffs to exhibit their film on the ground that, after all, it is *not* obscene.

[12] Normally standing is granted only when a defendant's own conduct is constitutionally protected. *United States* v. *Raines*, 1960, 362 U.S. 17. This rule has been relaxed in cases dealing with statutes affecting free expression. *See United States* v. *Raines*, *supra*, at 22 (dictum); *Thornhill* v. *Alabama*, 1940, 310 U.S. 88, 96-98; Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L. J. 599 (1962). However, even where free speech is involved, it may be that standing should not be granted unless the defendant's conduct is at least *arguably* constitutionally privileged. *Cf. Brown* v. *Louisiana*, 1966, 383 U.S. 131, 143, 147-48 (concurring opinion of Mr. Justice Brennan); *Dennis* v. *United States*, 341 U.S. 494, 515-17. We do not reach such questions.

the opportunity to apply to the Circuit Justice for a stay.

(s) BAILEY ALDRICH
U.S. Circuit Judge

(s) [ILLEGIBLE]
U.S. District Judge

UNITED STATES DISTRICT COURT
District of Massachusetts

Civil Action
No. 69-665-J

SERAFIM KAŔALEXIS ET AL.,
PLAINTIFFS

v.

GARRETT H. BYRNE, as he is the duly elected District Attorney for Suffolk County, City of Boston, Commonwealth of Massachusetts,
DEFENDANT

Before ALDRICH, *Circuit Judge*
JULIAN and PETTINE, *District Judges*

DISSENTING OPINION

November 28, 1969

JULIAN, J. (dissenting)

I do not agree with the majority. The constitutionality of the Massachusetts criminal obscenity statute[1] is presently being litigated in the Massachusetts Courts. Pend-

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[1] Mass. G.L. c. 272, § 28A provides as follows:

"Whoever . . . has in his possession . . . any obscene . . . print, picture, figure, image . . . for the purpose of . . . exhibition . . . shall be punished . . . ."

The Massachusetts Court has construed this statute implicitly to require proof that the defendant *knowingly* has such material in his possession. *Demetropolos* v. *Commonwealth*, 1961, 342 Mass. 658.

ing final adjudication by the Supreme Judicial Court of the plaintiffs' appeal from their conviction in the Superior Court for violating that statute, this Court should abstain from taking further action in this case and should not interfere with the enforcement of the statute by the Commonwealth by enjoining its public officials from prosecuting the plaintiffs for additional violations of the statute should they persist in exhibiting the film while their conviction still stands.

It is my understanding that for the purpose of deciding the questions presently before us the Court assumes that the film involved in this litigation is in fact obscene within the meaning of the law. In fact, no evidence has been taken and no finding made on this issue by this Court. The Superior Court has found the film to be obscene.

The plaintiffs' reliance on *Stanley* v. *Georgia*, 394 U.S. 557 (1969), is untenable. The case before us is governed by *Roth* v. *United States*, 354 U.S. 476 (1957). The precise issue in *Roth* was the constitutionality under the First Amendment of two criminal obscenity statutes. One was a Federal statute (18 U.S.C. § 1461) which made it a crime for anyone to deposit for mailing and delivery obscene books, circulars or advertising. The other was a California statute (West's Ca. Penal Code Ann., 1955, § 311) which made it a crime for any person willfully and lewdly to keep for sale an obscene book or to publish an obscene advertisement of them. The Supreme Court held both statutes constitutional.

The Massachusetts statute before us is essentially the same as the two statutes upheld in *Roth* in that all three make the public distribution of obscene matter a criminal offense. This being so, it must follow as a matter of elementary logic that the Massachusetts statute is also constitutional.

The holding in *Roth* is still the law and is binding upon

this Court. It has not been overruled by *Stanley* or any other case.

In *Stanley* the appellant was indicted, tried and convicted for "knowingly hav[ing] possession of ... obscene matter" in violation of a Georgia statute. The Georgia Supreme Court affirmed, holding it "not essential to an indictment charging one with possession of obscene matter that it be alleged that such possession was with 'intent to sell, expose or circulate the same.'" Appellant contended that the Georgia obscenity statute was unconstitutional insofar as it punishes mere private possession of obscene matter. The United States Supreme Court agreed and held that "the mere privative possession of obscene matter cannot constitutionally be made a crime." The Supreme Court takes pains to distinguish the case before it from *Roth* and similar cases in which *public commercial dissemination* of obscene material is involved.

The Court notes (p. 559) that the Georgia statute extended "further than the typical statute forbidding commercial sales of obscene material." It also notes (p. 559) that the "State and appellant both agree that the question here before us is 'whether a statute imposing criminal sanctions upon the mere [knowing] possession of obscene matter' is constitutional." The Court points out (pp. 560-561) that neither *Roth* nor any subsequent decision dealt with that question but "dealt with the power of the State and Federal Governments to prohibit or regulate certain *public* actions taken or intended to be taken with respect to obscene matter." (Emphasis supplied.)

And again at p. 567: "But that case [*Roth*] dealt with public distribution of obscene materials and such distribution is subject to different objections." In note 10 on the same page the Court makes reference to the Model Penal Code § 251.4 (American Law Institute, Proposed Official Draft, 1962) which would also make commercial dissemina-

tion of obscene matter a criminal offense. The Court concludes by stating (p. 568):

> "We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. *Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home."

Thus the Supreme Court itself has declared in clear, unambiguous language that the holding in *Roth* has not been overruled by the decision in *Stanley* and is still the law.

Accordingly, on the authority of *Roth*, I would reject as wholly unjustified the plaintiffs' contention that the Massachusetts obscenity statute is unconstitutional on its face.

On the question of abstention the pertinent cases are *Dombrowski* v. *Pfister*, 1965, 380 U.S. 479,[2] and *Zwickler* v. *Koota*, 1967, 389 U.S. 241.[3] In both those cases the statutes under attack were held to be overbroad and susceptible of sweeping and improper application and therefore justifiably attacked on their face as abridging expression protected by the First Amendment. Additionally, though threatened with prosecution, the petitioner in neither case was then in fact being prosecuted for violating the challenged statute and consequently its constitutionality was not being litigated in the State court. In *Dombrowski* there was the added element of bad faith on the part of the State prosecutor, an element certainly not present here. The Court accordingly held that abstention was not appropriate. Since the Massachusetts statute is

[2] The statute under attack was the Louisiana Subversive Activities and Communist Propaganda Control Law.

[3] The statute prohibited the distribution of anonymous handbills critical of political candidates.

not being justifiably attacked on its face as abridging free expression and since the case in the Massachusetts Court has been tried and decided and is now on appeal, it seems to me especially appropriate for this Court to abstain from proceeding to a declaratory adjudication of the constitutionality of the statute until the Supreme Judicial Court shall have heard and decided the appeal. The parties anticipate that this will happen within the next three or four months.

No injunction should issue against the defendant district attorney. He should be left free to prosecute these plaintiffs should they resume the exhibition of the film while their conviction in the Superior Court remains outstanding and their appeals pending.

The plaintiffs have failed to show the existence of the requisite grounds that would justify the issuance of a preliminary injunction:

(1) Since the statute is not unconstitutional on its face and the film is assumed by the Court to be obscene,[4] and has been found to be obscene by the Superior Court, the plaintiffs have failed to establish the probability that they will ultimately prevail in this litigation.

(2) There is no evidence before us that plaintiffs will suffer irreparable injury if they are prevented from showing the film until final disposition of their appeal. There has been no showing of the extent of the monetary loss, if any, that they will suffer if they are not allowed to show the film. We should not concern ourselves with the diminution in the value of the film if its showing is delayed for a substantial period of time. The film is not owned by the plaintiffs, but by Grove Press, Inc.,[5] which

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[4] In its Memorandum of July 15, 1969, this Court said: "[T]he Court . . . will not consider now or at any other time the claim that the film is not obscene, as an evidentiary matter."

[5] The motion of Grove Press, Inc., to Intervene as a party plaintiff was denied by the Court on July 15, 1969.

is not a party to this litigation. Furthermore, there is no evidence of the economic value of the film.

(3) The mere possibility that plaintiffs may be deprived of a constitutional right pending final determination of this case does not amount to the irreparable injury necessary to justify the issuance of the injunction.

Thus, in *Dombrowski v. Pfister*, 380 U.S. 479, 484-485, the Court states:

> "[T]he Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework. It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."

What the majority of this Court is doing today is without precedent. It is declaring that the public, commercialized dissemination of obscene matter to adults, regardless of how lewd and degenerate it may be, is protected expression under the First Amendment. I have found no authority for this proposition either in decided cases or in legislative enactments. On the contrary numerous statutes, both Federal and State, and a multitude of cases decided by the Supreme Court of the United States[6] and by other courts, Federal and State, have consistently denounced and punished as criminal the public, commercialized dissemination of obscene matter.

In my opinion the position taken by the majority of

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[6] See, for example, the cases listed in *Stanley*, supra, notes 5 and 6, at page 561.

this Court is legally unsound and inimical to the public interest. I must therefore dissent.

(s) ANTHONY JULIAN
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 69-665-J

SERAFIM KARALEXIS, JAMES VLAMOS
SYMPHONY CINEMA II, INC., and
FILM DISTRIBUTORS, INC., All of
252 Huntington Avenue, City of Boston,
County of Suffolk, Commonwealth of
Massachusetts,

PLAINTIFFS,

v.

GARRETT BYRNE, as he is the duly elected
District Attorney for Suffolk County,
City of Boston, Commonwealth of Massachusetts,
and Honorable Robert H. Quinn, Attorney
General of the Commonwealth of Massachusetts,

DEFENDANTS.

December 6, 1969

INJUNCTION

This cause came on to be heard upon a motion for a preliminary injunction pending a decision on the merits, and after hearing, and upon the findings and rulings contained in the court's opinion of November 28, 1969, it is hereby ordered, adjudged and decreed as follows:

The defendants, their agents, servants and successors in office, shall not, until further order of this court, proceed against, civilly or criminally, or otherwise interfere with, the plaintiffs Serafim Karalexis, James Vlamos,

Symphony Cinema II, Inc. and Film Distributors, Inc. on account of the showing of a certain moving picture film entitled "I Am Curious (Yellow)." Provided, that this injunction shall not apply if the said picture is advertised in a manner pandering to a prurient interest in sex, or is shown to an audience not warned of its possibly offensive character, or is shown to children under the age of 18 years.

Provided, further, that the prosecution of proceedings connected with the appeal of the plaintiffs from a certain decision against them in the criminal side of the Suffolk Superior Court, short of ordering the execution of sentence or other penalties, is not hereby forbidden.

By the Court,

(s) Bailey Aldrich
Circuit Judge

(s) Raymond J. Pettine
District Judge